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MICHAEL RODAK, J

Supreme Court of the United States

October Term, 1974
No. 74-1422

THE CINCINNATI ENQUIRER, INC. *et al.*,
Petitioners,

vs.

JEAN WHITEHOUSE RAMEY *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

RICHARD F. STEVENS and
H. STEPHEN MADSEN
1956 Union Commerce Building
Cleveland, Ohio 44115
Attorneys for Respondents The E. W. Scripps Company, The Scripps-Howard Investment Company and Jack R. Howard

Of Counsel:
BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115

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TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

COUNTERSTATEMENT OF THE CASE 3

REASONS FOR NOT GRANTING THE WRIT 6

1. The Sixth Circuit Correctly Held That the Attorneys' Fees Awarded Plaintiffs' Counsel in the Four Derivative Shareholders' Suits Must Be Borne Solely by the Defendant Corporation, the Real Client in Those Suits, and Are Not Chargeable Against the Individual Shareholder Defendants 6

2. The Sixth Circuit Correctly Held That No Basis Exists for Imposing Upon Scripps the Plaintiffs' Attorneys' Fees and Expenses in the Stockholders' Derivative Suits 9

3. This Litigation Does Not Present Significant Recurring Problems or a Conflict in the Circuits 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases Cited

Alyeska Pipeline Service Co. v. Wilderness Society, 43 U.S.L.W. 4561, 4563-67 (U.S. May 12, 1975) 6, 13
Fleischmann Distilling Corp. v. Maier Brewing Co., 368 U.S. 714, 717 (1967) 6
Hall v. Cole, 412 U.S. 1, 4 (1973) 6, 10
Jones v. Uris Sales Corp., 373 F.2d 644 (2d Cir. 1967) 8
Mencher v. Sachs, 164 A.2d 320, 323 (Del. 1960) 8
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 7, 8, 13
F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 126-31 (1974) 6, 9, 10, 13

United States Statutes Cited

28 U.S.C. §1254(1) 2

Other Citations

Restatement of the Law of Restitution §1, Comment c .. 13

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THE CINCINNATI ENQUIRER, INC. and AMERICAN FINANCIAL CORPORATION,
Petitioners,

vs.

JEAN WHITEHOUSE RAMEY; ANGIOLINA MORELLI; ALBERT HARRIS; THE E. W. SCRIPPS COMPANY; THE SCRIPPS-HOWARD INVESTMENT COMPANY, and JACK R. HOWARD; and CECIL F. SCHOEN, a.k.a. CECILE F. SCHOEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

After the four derivative shareholder suits in question became moot, the District Court of the Southern District of Ohio, Western Division, issued tentative findings of

fact and conclusions of law at a hearing in chambers on February 12, 1971 (App. F to the Pet.). On September 13, 1973, the District Court confirmed its tentative findings and conclusions in its Opinion on the Application for Fees by Plaintiffs' attorneys (App. E to the Pet.), which was implemented by an Order and Decree issued October 10, 1973 (App. D to the Pet.). On December 26, 1974, the Court of Appeals for the Sixth Circuit issued its opinion which appears at 508 F.2d 1188 (6th Cir. 1974) and App. C to the Petition. On February 12, 1975, a Petition for Rehearing (App. B to the Pet.) was denied (App. A to the Pet.).

JURISDICTION

On December 26, 1974, the Court of Appeals for the Sixth Circuit entered its Judgment. On February 12, 1975 a timely Petition for Rehearing was denied, and the Petition for Writ of Certiorari was filed within ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court below correctly impose the attorneys' fees awarded plaintiffs in four shareholders' derivative suits solely against the corporation?

2. Did the Court below correctly refuse to impose any part of plaintiffs' attorneys' fees in the shareholders' derivative actions against the former shareholders where they received no direct benefits from the litigation and there was no finding that they had acted fraudulently or in bad faith, vexatiously, wantonly or for oppressive reasons?

COUNTERSTATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks review of the imposition of plaintiffs' attorneys' fees upon the corporation in four derivative shareholder suits that were dismissed on grounds of mootness after trial but before adjudication.

This litigation is the last in a series of controversies which began with a civil antitrust action filed in 1964 by the Department of Justice against The E. W. Scripps Company.* Scripps, while owning Cincinnati's only evening newspaper, *The Cincinnati Post and Times Star*, had acquired voting trust certificates representing the majority equity interest in petitioner The Cincinnati Enquirer, Inc. ("Enquirer"), publisher of *The Cincinnati Enquirer*, Cincinnati's only morning and Sunday newspaper. Pursuant to a Consent Decree entered prior to trial on November 8, 1968, Scripps was required to divest itself within 18 months of its interest in the Enquirer, which divestiture date was later extended from time to time.

On June 16, 1970, a wholly-owned Enquirer subsidiary made a $35 cash offer per share to Scripps to acquire its Enquirer stock. On June 23, 1970, Scripps accepted the Enquirer offer. A Stock Acquisition Agreement (the "Agreement") was later entered into and a special meeting of the Enquirer's shareholders was called for October 23, 1970 to consider approval of the Agreement and authorization of necessary corporate action.

In October 1970 two shareholder derivative actions (*Ramey* and *Morelli*) were filed seeking to enjoin the trans-

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*Respondents The E. W. Scripps Company, The Scripps-Howard Investment Company and Jack R. Howard are collectively referred to herein as "Scripps."

action and claiming violations of the federal security laws, Ohio corporation law and fiduciary duties allegedly owed by Scripps as majority shareholder to both the Enquirer and its minority shareholders. The District Court entered an Order on October 22, 1970 temporarily restraining consummation of the transaction but authorizing the Enquirer to hold its special shareholder meeting on October 23, 1970 and to vote on approval of the proposed transaction. The Enquirer's shareholders, other than Scripps, approved the acquisition of the Scripps-held shares. The third (*Harris*) and fourth (*Schoen*) shareholder derivative actions seeking similar relief were subsequently filed.

The four cases were tried from November 16, 1970 to January 18, 1971. On January 28, 1971, ten days after conclusion of the trial, Scripps received a written offer of $35 cash per share from Blue Chip Stamps ("Blue Chip"), which offer also ran to the Enquirer's minority shareholders.

Under the Agreement, Scripps had the right to terminate the transaction if litigation was filed or threatened. On February 1, 1971, pursuant to Scripps' right of termination (which Petitioner admits existed, see Pet. pp. 5 and 14), Scripps advised the District Court and the Government that it would not extend the Agreement with the Enquirer past its February 1, 1971, termination date because of its receipt of the Blue Chip offer. That offer, running to all Enquirer shareholders, for the first time, presented a viable alternative to the proposed Enquirer transaction. The District Court ordered Scripps to extend the Agreement until February 11, 1971. On that date, upon denial by the District Court of the Government's motion for a further extension, Scripps exercised its contractual right and terminated the Agreement with the Enquirer, thereby mooting the four derivative shareholder actions.

Also on February 11, 1971, Scripps received a written offer of $40 cash per share from Petitioner American Financial Corporation ("AFC") which also ran to all Enquirer shareholders.

On February 12, 1971, the District Court, with full knowledge of the foregoing, issued an informal opinion disclosing the findings of fact it would have made and conclusions of law it would have entered had the cases not been mooted (67a-80a). The District Court completely exonerated Scripps on every charge leveled against it (79a) but did find certain material omissions in the Enquirer's proxy statement and procedural violations of Ohio corporation law. The District Court recognized that the Enquirer had the power, if properly exercised, to acquire the Scripps-held shares and postulated its right to resubmit the proposed transaction to its shareholders.

On February 19, 1971, Scripps accepted a revised AFC $40 per share cash offer subject to approval by the Government and the Federal Reserve Board. Pursuant to an AFC offer of $40 per share in cash or, at the shareholder's option, an exchange for certain AFC securities, other Enquirer shareholders sold or exchanged over 291,000 Enquirer common shares to AFC which now owns all of the Enquirer's common shares.

By Order entered October 10, 1973, the District Court allowed plaintiffs a total of $865,000 as attorneys' fees and $35,115.96 as expenses (38a-63a). Although completely exonerated, Scripps was nonetheless ordered to pay toward these fees and expenses at the rate of 65 cents a share for a total of $326,290.90 on its 501,986 Enquirer shares. The former Enquirer minority shareholders who were paid cash by AFC or exchanged their shares for AFC securities were ordered to pay at the rate of 50

cents per share towards plaintiffs' attorneys' fees and expenses and the Enquirer was ordered to pay the balance.

On appeal, the Sixth Circuit Court of Appeals reversed the District Court and held that Scripps and the former Enquirer minority shareholders were not liable for any portion of plaintiffs' attorneys' fees or expenses (15a-36a). The Court of Appeals disallowed the District Court's award of $115,000 as prejudgment interest and ordered the Enquirer to pay the plaintiffs' attorneys' fees of $750,000 and expenses of $35,115.96. On January 9, 1975, Petitioner filed a Petition for Rehearing (6a-13a) which was denied on February 12, 1975 (1a-3a).

REASONS FOR NOT GRANTING THE WRIT

1. The Sixth Circuit Correctly Held That the Attorneys' Fees Awarded Plaintiffs' Counsel in the Four Derivative Shareholders' Suits Must Be Borne Solely by the Defendant Corporation, the Real Client in Those Suits, and Are Not Chargeable Against the Individual Shareholder Defendants.

The Sixth Circuit applied the basic American rule that each party must bear the costs of its own legal representation and that attorneys' fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 368 U.S. 714, 717 (1967); *Alyeska Pipeline Service Co. v. Wilderness Society*, 43 U.S.L.W. 4561, 4563-67 (U.S. May 12, 1975); *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 126-31 (1974); *Hall v. Cole*, 412 U.S. 1, 4 (1973).

Plaintiffs' attorneys' real client was the Enquirer on whose behalf the derivative suits were brought. This Court has held that plaintiffs' attorneys' fees in successful derivative actions to enforce the federal securities acts must be paid by the corporation. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). In vacating the judgment below insofar as it imposed any part of plaintiffs' attorneys' fees upon Scripps and the minority shareholders, the Sixth Circuit correctly applied *Mills* and stated:

> "It is a general principle of corporate law that a minority stockholder who proceeds at his own expense in a derivative action resulting in a substantial benefit to the corporation is entitled to recover reasonable counsel fees from the corporation that has benefitted from his efforts. *See* 19 AM. JUR. 2d *Corporations* §588, at 111 (1965); 13 W. FLETCHER, PRIVATE CORPORATIONS §6045 (perm. ed. 1970); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §2675 (1973); Annot., *Litigation Expense—Corporate Charge* 39 A.L.R.2d 580, 585 (1955); Annot., *Litigation Expense Corporation Liability* 152 A.L.R. 909, 914 (1914).
>
> "The cases make it clear that '[t]he obligation to reimburse a shareholder who brings a successful derivative suit is an obligation of the corporation.' *Levine v. Bradlee*, 278 F.2d 620, 622 (3d Cir. 1967). *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-90 (1970) (assessing fees against corporation); *Kahan v. Rosenstiel*, 424 F.2d 161, 167 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970) ('In derivative suits . . . the corporation which benefits from the suit . . . is directed to pay [attorneys' fees].'); *Denney v. Phillips & Buttorff Corp.*, 331 F.2d 249 (6th Cir.), *cert. denied*, 378 U.S. 931 (1974) (assessing fees against corporation). Counsel fees in such cases are

not awarded individually against other stockholders who may have profited from the derivative litigation, but against the corporation. Speaking for the court in *Jones v. Uris Sales Corp.*, 373 F.2d 644, 648 (2d Cir. 1967), Judge Friendly explained the rationale for this rule as follows:

> "'[T]he reason for the award of such fees in a stockholder's derivative suit . . . [is] that the plaintiff's efforts have conferred on the corporation a benefit for which the corporation would otherwise have had to pay itself.'" (33a-34a).

Plaintiffs' derivative shareholder litigation did confer a corporate therapeutic benefit upon the Enquirer corporation under *Mills* because the District Court found violations of the federal securities law and Ohio corporation law which would have required resubmission of the proposed Enquirer-Scripps transaction to the Enquirer's shareholders. In essence, the sole result of plaintiffs' efforts would have been to assure that additional corporate steps were taken by the Enquirer and that its proxy statement make the further disclosures indicated by the District Court in its February 12, 1971 Opinion (78a-79a). The Sixth Circuit correctly held that the costs of these therapeutic benefits received by the corporation are not chargeable directly against its shareholders. *Mills v. Electric Auto-Lite Co., supra*; *Jones v. Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967); *Mencher v. Sachs*, 164 A.2d 320, 323 (Del. 1960).

The fact that Scripps subsequently sold its majority interest in the Enquirer to AFC furnishes no basis for charging Scripps, as former shareholders, rather than the corporation with plaintiffs' fees and expenses. There is no suggestion in *Mills* that the 8,987 individual shareholders

of Electric Auto-Lite, or its former shareholders who had disposed of their stock or the Mergenthaler preferred received in exchange therefor, should bear the expense of the litigation attacking the merger there involved otherwise than through payment by the surviving corporation.

AFC should now bear plaintiffs' attorneys' fees and expenses as the present sole shareholder of the Enquirer. A contrary determination would violate the fundamental concept of corporate law that the Enquirer is a legal entity separate and distinct from its individual shareholders and that changes in share ownership have no effect upon that separate corporate selfhood.

2. The Sixth Circuit Correctly Held That No Basis Exists for Imposing Upon Scripps the Plaintiffs' Attorneys' Fees and Expenses in the Stockholders' Derivative Suits.

As this Court stated in *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (1974) at 129-130:

> "* * * The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class. * * *"

The Sixth Circuit rightly held that none of these exceptions apply as to Scripps or the Enquirer's minority

shareholders. Plaintiffs' counsel were not successful as to Scripps in the derivative suits. They did not represent Scripps, established no claims against it and therefore were not entitled to any fees from it.

Nor did the Courts below find that Scripps had "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 4 (1973). To the contrary, the District Court wholly exonerated Scripps with respect to the Enquirer transaction which was the sole subject of the plaintiffs' derivative shareholder suits:

> "I find no evidence of conspiracy or breach of fiduciary duty on the part of the Directors or breach of fiduciary duty on the part of the majority shareholder to the minority shareholders." (79a).

The District Court's decision awarding plaintiffs' attorneys' fees also recognized that Scripps was not guilty of any wrongdoing (62a-63a). The Sixth Circuit correctly held that no legal basis existed for awarding any part of the plaintiffs' attorneys' fees against Scripps or the minority shareholders "Absent a finding that Scripps or the minority shareholders acted fraudulently or 'in bad faith, vexatiously, wantonly, or for oppressive reasons' " (35a).

Nor did plaintiffs' derivative shareholder suits confer any direct benefit on Scripps which would justify imposing plaintiffs' attorneys' fees on it. No claims were established; no money was generated; no fund was established; no dollar benefit was conferred or detriment avoided. The District Court erroneously required Scripps to contribute to the payment of plaintiffs' attorneys' fees and expenses largely because of the incidental, fortuitous benefits it derived from the AFC offer which was received during the pendency of the plaintiffs' litigation:

> "The Court concludes this is a proper case for allocation, *but hastens to point out this is not because of any bad faith or the participation of the Scripps Group in the preparation of the proxy statement and agreements. They did indeed participate, and their suggestions—eventually, at least—were welcomed by the Enquirer. There was no bad faith on their part, and the Court so found.* Nevertheless, the Scripps group occupied a fiduciary position. They came out real well and *the time it took for this litigation worked to their great advantage in that a better offer came along*—one for $5 more per share and which took them off the hook as far as exposure to claims that they were civilly liable if they accepted any offer which did not run to the minority shareholders. Much more could be said, but that should suffice to show why the Court concludes this is a proper case for allocation. We therefore conclude that the Scripps Group should pay (toward fees and expenses) at the rate of 65¢ a share, for a total of $326,232.40 for their 501,896 shares." (Emphasis added; 62a-63a).

The Sixth Circuit correctly held that such incidental benefits could not be the basis for taxing plaintiffs' attorneys' fees and expenses against Scripps:

> "The fact that the Scripps group and the minority stockholders profited from the sale of their stock at higher prices than those provided in the original contract is no basis for assessing against them any part of the attorneys' fees awarded to counsel who filed the derivative actions on behalf of the Enquirer. Incidental benefits to Scripps or minority stockholders, in the absence of an adjudication of fraud or misconduct on their part, does not justify a judgment against

them for any part of the attorneys' fees. *See Schleit v. British Overseas Airways Corp.*, 410 F.2d 261, 262 (D.C. Cir. 1969); *Preston v. United States*, 284 F.2d 514, 515-16 (9th Cir. 1960); *Jett v. Merchants & Planters Bank*, 228 F.2d 156, 159 (4th Cir. 1955)." (35a).

Petitioners' claim (Pet. p. 13) that Scripps should be liable for plaintiffs' attorneys' fees because Scripps relieved itself of exposure or liability by taking affirmative action on its own to moot plaintiffs' cases has no basis in fact and is misleading. The District Court found that Scripps had not violated any fiduciary duty to the minority shareholders with respect to the Enquirer transaction. The possibility of Scripps' liability as majority shareholder to the minority shareholders, referred to by the District Court in its Tentative Findings of Fact, would arise only "* * * if the case is reopened to include evidence that, after the close of the trial of the case, an offer was received which constituted an 'alternate' to the offer of the Enquirer. I find no alternate existed prior to that." (79a-80a). The third party Blue Chip offer (and later the AFC offer) received after completion of the trial did raise minority shareholder questions which were wholly unrelated to the Enquirer transaction which was the sole subject of plaintiffs' litigation. That litigation neither caused, nor could it have any effect with respect to, the Blue Chip or AFC offers.

Neither the pending shareholder derivative suits nor the 2-1/2 month trial which ended January 18, 1971, caused Scripps to terminate the Enquirer-Scripps transaction. Under the Agreement, the filing in October of 1970 of plaintiffs' derivative suits had given Scripps the right to terminate, but that right had not been exercised because no alternatives were available to Scripps. The

Blue Chip and AFC offers completely changed the existing situation and, for the first time, presented new alternatives and opportunities to both Scripps and the minority shareholders.

The exercise by Scripps of its acknowledged contractual right to terminate the Enquirer-Scripps Agreement affords no basis for imposing plaintiffs' attorneys' fees upon Scripps (Pet. for Cert. pp. 5 and 14).

Nor will Scripps or the minority shareholders who sold their stock to AFC for cash or exchanged their stock for AFC securities be "unjustly enriched" by the taxation of plaintiffs' attorneys' fees solely against the Enquirer corporation. To the contrary, the Enquirer (now AFC) would be unjustly enriched and receive a rebate of a portion of its purchase price if its former shareholders were required to pay its corporate debt. Scripps and the minority shareholders were entitled to sell their shares for the best price they could obtain. In receiving said purchase price, they were receiving money which was rightfully theirs. Stated otherwise, Scripps and the other shareholders may have been enriched by the sale of their shares but they were not unjustly enriched. *Restatement of the Law of Restitution*, Section 1, Comment (c).

3. This Litigation Does Not Present Significant Recurring Problems or a Conflict in the Circuits.

Contrary to Petitioners' contention (Pet. p. 7), the decision below rests on the unique facts and circumstances of these four shareholder derivative suits. It presents neither significant recurrent problems nor a conflict in the decisions of the Circuits. The decision of the Court below was in full keeping with this Court's decision in *Mills* and its recent pronouncements in *Alyeska Pipeline* and *F. D. Rich*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD F. STEVENS
H. STEPHEN MADSEN
1956 Union Commerce Building
Cleveland, Ohio 44115
Attorneys for Respondents The E. W. Scripps Company, The Scripps-Howard Investment Company and Jack R. Howard

Of Counsel:
BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115

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